STATE OF MICHIGAN

COURT OF APPEALS

FREDERICK MANNING and LINDA MANNING,

Plaintiffs-Appellants/Cross-Appellees,

v

CITY OF EAST TAWAS,

Defendant-Appellee/Cross-Appellant,

and

BLINDA A. BAKER,

Defendant-Appellee.

UNPUBLISHED
January 22, 1999

No. 202143
Iosco Circuit Court
LC No. 95-009300 NZ

Before: Hoekstra, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Plaintiffs appeal as of right, and defendant City of East Tawas (the City) cross-appeals, from an order granting summary disposition in favor of the City on plaintiffs' due process claims based on the ripeness doctrine as set forth in *Paragon Properties Co v Novi*, 452 Mich 568; 550 NW2d 772 (1996). The parties also challenge prior orders entered in connection with their motions for summary disposition. We affirm in part, reverse in part, and remand for further proceedings.

This action stems from plaintiffs' proposal to build a recreational vehicle park within the City under the planned unit development (PUD) article of the City's zoning ordinance. The City's planning commission recommended to the city council that plaintiffs' PUD application and site plan be approved, with conditions. The city council denied the request. On August 29, 1994, plaintiffs attempted to bring the matter before the City's Zoning Board of Appeals, but the request for hearing was denied for procedural reasons. Plaintiffs then filed the instant action in the circuit court against the City and its clerk, Blinda Baker, alleging a deprivation of due process and requesting equitable relief, damages, and a writ of mandamus. Defendants filed a joint motion for summary disposition under MCR 2.116(C)(4), on the ground that plaintiffs could not invoke the circuit court's jurisdiction in its appellate capacity

because they did not timely file an appeal to the circuit court from the city council's decision. The trial court denied the motion based on representations by plaintiffs' attorney that plaintiffs were raising only constitutional issues.

Plaintiffs then filed an amended complaint with three constitutional due process counts and a count pursuant to the Michigan antitrust reform act (MARA), MCL 445.771 *et seq.*; MSA 28.70(1) *et seq*. The amended complaint neither named Baker as a defendant nor sought a writ of mandamus. The City moved for summary disposition of the three constitutional counts under MCR 2.116(C)(10), while plaintiffs sought judgment in their favor under MCR 2.116(I)(2). The trial court determined that there were disputed issues of material fact and thus denied the motions. The City then moved for summary disposition under MCR 2.116(C)(4), asserting that the claims were not ripe for judicial consideration, and the trial court granted the motion for all three counts.

I. Ripeness

Plaintiffs contend that the trial court erred in granting summary disposition in favor of the City under the ripeness doctrine and, alternatively, that the City is barred by its own conduct or that of its representatives from arguing that plaintiffs did not receive a final decision from the City. We decline to consider the latter argument because plaintiffs failed to brief that argument or otherwise cite authority for the proposition that it is material to the ripeness doctrine. A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim. *In re Hamlet (After Remand)*, 225 Mich App 505, 521; 571 NW2d 750 (1997); *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). Accordingly, we will confine our review to the question whether plaintiffs' due process counts were ripe for judicial consideration. Our review is de novo. *Walker v Johnson & Johnson Vision Products, Inc*, 217 Mich App 705, 708; 552 NW2d 679 (1996). When reviewing a motion for summary disposition under MCR 2.116(C)(4), this Court "must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law or whether the affidavits and other proofs show that there was no genuine issue of material fact." *Walker, supra* at 708.

A citizen's right to due process of law when facing certain kinds of adverse action at the hands of the state or one of its subdivisions is guaranteed under both the federal and state constitutions. US Const, Am XIV, § 1; Const 1963, art 1, § 17. "Due process protects vested property rights or entitlements." *Michigan Ed Ass'n v State Bd of Ed*, 163 Mich App 92, 98; 414 NW2d 153 (1987). However, constitutional due process guarantees reach further than merely insuring fair procedures in the execution of policy: "The Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v Burch*, 494 US 113, 125; 110 S Ct 975; 108 L Ed 2d 100 (1990), quoting *Daniels v Williams*, 474 US 327, 331; 106 S Ct 662; 88 L Ed 2d 662 (1986). "A claim may be based on the denial of substantive due process where a plaintiff is deprived of property rights by irrational or arbitrary governmental action." *Bevan v Brandon Twp*, 438 Mich 385, 391; 475 NW2d 37 (1991) (internal quotation marks and citation omitted).

Courts adhering to the ripeness doctrine "will not act when the issue is only hypothetical or the existence of a controversy merely speculative. . . . The question in each case is whether there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Black's Law Dictionary (6th ed, 1990), p 1328. Thus, appeal to the courts of an administrative decision is not appropriate before the decision of the administrative body may be considered final. See *Paragon Properties Co, supra* at 577. However, a showing of futility may trigger an exception to the finality requirement. See *id.* at 581-583 (considering, but rejecting, the futility argument), and *Kawaoka v City of Arroyo Grande*, 17 F3d 1227, 1232 (CA 9, 1994).

Plaintiffs challenged the City's zoning ordinance, both on its face and as applied to them, on substantive due process grounds, and also on purely procedural grounds. We hold that the facial challenge and procedural challenge were ripe for judicial consideration, but that the "as applied" challenge was not.

A. Substantive Due Process, As Applied

In the context of zoning ordinances, "an 'as applied' challenge alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution." *Paragon Properties, supra* at 576. Such challenges are subject to the rules of finality. *Id.* "Typically, before a decision is final the landowner must have submitted one formal development plan and sought a variance from any regulations barring development in the proposed plan that have been denied." *Kawaoka, supra* at 1232. Consistent with this general rule, our Supreme Court held that mere denial of a rezoning request was not a final decision, *Paragon Properties, supra* at 579, because, "absent a request for a variance, there is no information regarding the potential uses of the property that might have been permitted, nor, therefore, is there information regarding the extent of the injury . . . suffered as a result of the ordinance," *id.* at 580.

In general, a variance is "a license to use property in a way not permitted under an ordinance." *Id.* at 575. However, a variance may also address such matters as the details of dimensional requirements in a site plan. See, e.g., *Frericks v Highland Twp*, 228 Mich App 575, 582-583; 579 NW2d 441 (1998); *Nat'l Boatland, Inc v Farmington Hills Zoning Bd of Appeals*, 146 Mich App 380, 387; 380 NW2d 472 (1985). "Although . . . a land use variance cannot change the zoning district classification or amend the zoning ordinance, the effect of a land use variance is similar to rezoning because variances typically run with the land." *Paragon Properties, supra* at 575. Special use permits, or the approval of a PUD itself, can also temper the effect of a zoning ordinance. *Id.* at 574.

In the present case, plaintiffs' amended complaint alleged the deprivation of "a reasonable use of their property to their harm and detriment." Assuming that plaintiffs have a cognizable claim of substantive due process based on a specific alleged reasonable use, we must determine whether plaintiffs' claim was ripe for judicial consideration in light of their not having pursued any of the options that the City claimed were available to them after the city council's denial of their PUD application and site plan. When moving for summary disposition the City maintained that avenues for relief remained

available to plaintiffs, including procedures for variances or amendment of the zoning ordinance, or special use permits.[1]

We conclude that the trial court reached the correct result in ruling that plaintiffs' "as applied" challenge was not ripe because, although plaintiffs satisfied their burden of submitting one meaningful development proposal, they failed either to pursue other available avenues for relief or to establish a genuine issue of material fact concerning whether such pursuits would have been futile.

Pursuit of the options relied upon by the City to argue that finality was not achieved would indeed have been unnecessary and futile if the proposed recreational vehicle park were already permitted as a principal use under the highway service commercial district in Article XI, § 11.02 of the ordinance, on which plaintiffs relied for bringing the recreational vehicle park within the PUD designation. In other words, plaintiffs had no obligation to pursue other options if their proposed use already fell within the literal provision of the zoning ordinance upon which they based their PUD application and site plan. However, from the City's position that a variance, special permit, or amendment of the ordinance could have been pursued, we must infer that the City's posture is that a recreational vehicle park does not come within the permitted use of "transient lodging facilities" in Article XI, § 11.02, for the highway service commercial district. In any event, while neither party has squarely addressed the proper interpretation of that provision, we will address it because this is an issue of law that is necessary to a proper resolution of this case.[2] *Providence Hospital v National Labor Union Health & Welfare Fund*, 162 Mich App 191, 194-195; 412 NW2d 690 (1987).

We construe a zoning ordinance to effectuate the intent of the legislative body adopting it, under the principles that govern statutory interpretation. *Jones v Wilcox*, 190 Mich App 564, 566; 476 NW2d 473 (1991). Hence, judicial construction is not permitted unless reasonable minds could differ on the meaning of the ordinance. *In re Quintero Estate*, 224 Mich App 682, 693; 569 NW2d 889 (1997). To the extent possible, particular provisions should be read in the context of the entire ordinance to produce a harmonious whole. *Id.* at 693; see also *Jones*, *supra* at 566.

Article II, § 2.02 defines a recreational vehicle park as a "family recreation oriented facility for the overnight or short-term (not to exceed (14) days consecutively) parking of travel trailers, recreation vehicles or tents but not including mobile homes. May also be known as a campground." However, Article XI, § 11.02, concerning principal uses, requires that a use be "conducted completely within a building, except as otherwise provided for specific uses," making no mention of recreational vehicle park use. Further, that section's specific inclusion of "transient lodging facilities, including motels and hotels" in § 11.02 cannot be reasonably construed as excluding the building requirement. The other listed specific permitted principal uses comport with the stated purpose of the highway service commercial district described in § 11.01, to "provide for servicing the needs of highway traffic," because they are directed at highway travelers, with the range of uses given in § 11.02 including parking areas, repair services, and bus stations, and the provision of "goods, foods and services which are directly needed by highway travellers." A recreational vehicle park, by contrast, as a family *recreation*-orientated facility, is a use more compatible with permitted "special uses" for this district in § 11.03 (e.g., "recreation and sports areas").

Thus, viewing the zoning ordinance as whole, we conclude that the ordinance may reasonably be construed as recognizing the recreational vehicle park use in the definitional section, but as not including a recreational vehicle park as a specific permitted principal use in a highway service commercial district. Article XI, § 11.02 omits "recreational vehicle park" language, omits recreational functions, and imposes a complete building requirement (unless otherwise provided for a specific use). Accordingly, we conclude that the "as applied" substantive due process claim was not ripe for judicial consideration because plaintiffs did not establish a genuine issue of fact on the futility of pursuing another avenue that might have made them eligible to develop their property as a recreational vehicle park.

B. Substantive Due Process, Facial Challenge

We find merit in plaintiffs' position that the trial court erred in granting summary disposition in favor of the City on the facial substantive due process claim. Although the trial court made no distinctions between plaintiffs' due process counts when granting summary disposition on grounds of ripeness, under Michigan law "[f]inality is not required for facial challenges because such challenges attack the very existence or enactment of an ordinance." *Paragon Properties, supra* at 577.

A substantive due process claim requires proof that no reasonable governmental interest is advanced by the zoning classification, or that the ordinance is "unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question." *Kropf v Sterling Heights*, 391 Mich 139, 158; 215 NW2d 179 (1974). Here, plaintiffs challenged the zoning ordinance on the ground that it made no provisions for the placement of recreational vehicle parks. We reject the City's contention that plaintiffs' facial attack was not ripe because it was "bound up" in the substantive due process claim. We reverse the trial court's grant of summary disposition in this regard because plaintiffs' facial challenge to the zoning ordinance is ripe for judicial consideration.

C. Procedural Due Process

In general, procedural due process is a guarantee of a fair procedure, *Bevan, supra* at 392 n 7. A governmental deprivation of a citizen's property rights minimally requires that the citizen receive notice and an opportunity to be heard on the subject. *Mudge v Macomb Co*, 458 Mich 87, 101; 580 NW2d 845 (1998), citing *Howard v Grinage*, 82 F3d 1343, 1349 (CA 6, 1996).

In the present case, plaintiffs' amended complaint alleges a deprivation of the "full use and enjoyment of their substantial property rights," and cites their unsuccessful attempt to obtain review by the Zoning Board of Appeals as the basis for their procedural claim. We reject the City's argument that plaintiffs' procedural claim is not ripe because it is "bound up" in the "as applied" substantive due process claim. The ripeness doctrine does not preclude judicial consideration of plaintiffs' procedural due process claim because the failure to grant plaintiffs' request for review by the Zoning Board of Appeals, if shown to constitute a denial of due process, is an act that in and of itself inflicts immediate injury. See *Nasierowski Brothers Investment Co v Sterling Heights*, 949 F2d 890, 893 (CA 6, 1991). Plaintiffs' claim is not merely ancillary to the "as applied" substantive due process because the denial of an appeal forces plaintiffs to expend time and effort on options that would be unnecessary if an

appeal before the Zoning Board of Appeals were to afford them relief concerning their proposed PUD site plan. Accordingly, we reverse the trial court's determination that the procedural due process claim was not ripe for judicial consideration.

II. Mandamus

Plaintiffs contend that the trial court erred by precluding them from pursuing a mandamus claim against the city clerk. Mandamus is an extraordinary remedy and is appropriate only when no other remedy, legal or equitable, could achieve the desired result. *Tuscola Co Abstract Co v Tuscola Co Register of Deeds*, 206 Mich App 508, 510; 522 NW2d 686 (1994).

The trial court did not in fact rule on the issue of mandamus. At the hearing on the first motion for summary disposition brought under MCR 2.116(C)(4), the trial court denied the motion because plaintiffs' attorney maintained that plaintiffs were raising only constitutional claims, but then gave plaintiffs an opportunity to clarify those claims. Because plaintiffs neither requested a writ of mandamus at the hearing nor included such a request in their amended complaint, we deem any issue regarding mandamus to be abandoned. See *People v Riley*, 88 Mich App 727, 731; 279 NW2d 393 (1979) (no justifiable reason exists for allowing an appellant to raise an issue on appeal that the appellant voluntarily abandoned below); *Harrigan v Ford Motor Co*, 159 Mich App 776, 786; 406 NW2d 917 (1987) (error must be that of the trial court and not that which an aggrieved appellant contributed to by planned or neglectful omission), citing *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964).

Plaintiffs further argue generally that the trial court erred in restricting their claims in any way. This argument is abandoned because it is beyond the scope of the mandamus issue as set forth and under which plaintiffs raise this argument. See *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995). In any event, plaintiffs' argument is without merit.

The City here argues on cross-appeal that the trial court erred in failing to dismiss plaintiffs' entire complaint as an untimely appeal, repeating plaintiffs' mistake of presenting argument not germane to the question of mandamus under a statement of the issue exclusively concerned with mandamus. Accordingly we need not reach that issue. See *Id.* In any event, the City's argument is without merit. The City's reliance on *Carleton Sportsman's Club v Exeter Twp*, 217 Mich App 195, 201; 550 NW2d 867 (1996), and *Krohn v Saginaw*, 175 Mich App 193, 195-196; 437 NW2d 260 (1988), is misplaced. Whereas those two references concerned the circuit court's exercise of appellate jurisdiction over zoning decisions, in the instant case the trial court ruled that it was not exercising appellate jurisdiction. Further, the failure to take an appeal to a circuit court does not bar the prosecution of other causes of action within the circuit court's original jurisdiction. See *City of Iron Mountain v Krist Oil Co*, 439 Mich 988; 482 NW2d 458 (1992) (summary disposition), citing *London v Detroit*, 354 Mich 571, 574; 93 NW2d 262 (1958).

III. Michigan Antitrust Reform Act

Plaintiffs challenge the trial court's grant of summary disposition under MCR 2.116(C)(8), in favor of the City on the MARA count. A motion under MCR 2.116(C)(8) tests the legal sufficiency of the claim from the pleadings alone. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a decision under MCR 2.116(C)(8), the appellate court's task is to review the pleadings de novo to determine if the plaintiff has stated a claim upon which relief may be granted. *Id.* We hold that the trial court reached the correct result in granting the City's motion for summary disposition.

We agree with plaintiffs that the City is a "person" as defined in § 1(a) of the MARA, because the City is a legal entity. However, the City and its officials, employees, and agents also constitute a "unit of government" as defined in §1(d). Further, the MARA expressly limits its applicability as concerns governmental units: "This act shall not be construed to prohibit, invalidate, or make unlawful any act or conduct of any *unit of government*, when the unit of government is acting in a subject matter area in which it is authorized by law to act . . . ." MCL 445.774(3); MSA 28.70(4)(3) (emphasis added).

Accepting all factual allegations in the amended complaint as true and construing them most favorably to the plaintiffs, *Blair v Checker Cab Co*, 219 Mich App 667, 673; 558 NW2d 439 (1996), we conclude that plaintiffs' amended complaint fails as a matter of law to state a claim under the MARA, because the amended complaint does not allege that the city council acted outside of an authorized subject matter area when it rendered its August 29, 1994, decision. Although the MARA count alleges that the City's operation of a "for profit" business was not authorized by law, this was not the activity undertaken on August 29, 1994, concerning which plaintiffs sought relief. No factual development could justify plaintiffs' recovery from the City under the MARA because zoning matters, including PUDs, are a subject matter upon which the City is authorized by law to act. MCL 125.584b; MSA 5.2934(2).

IV. Judgment on the Merits

Finally, we have considered the parties' arguments concerning whether the trial court erred in failing to dispose of the due process counts on their merits on summary disposition under MCR 2.116(C)(10) or (I)(2). A motion under MCR 2.116(C)(10) tests the factual support of for plaintiff's claim. *Spiek, supra* at 337. The pleadings and proofs submitted to the trial court are viewed in a light most favorable to the party opposing the motion to determine if a genuine issue of material fact exists for resolution at trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). If it appears that the opposing party, rather than the moving party, is entitled to judgment as a matter of law, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2).

The City challenged the factual support for all three of plaintiffs' due process counts. Because we have concluded that plaintiffs' "as applied" substantive due process count is not ripe for judicial consideration, we decline to consider the parties' arguments on the merits of this count here.

With regard to the facial substantive due process challenge, we hold that neither party has established grounds for disturbing the trial court's denial of summary disposition.

The validity of an ordinance does not depend on a formal master plan. *Sabo v Monroe Twp*, 394 Mich 531, 538-539; 232 NW2d 584 (1975). However, we uphold the trial court's denial of the City's motion for summary disposition because we find no merit in the "nonconforming use" theory presented by the City to establish that recreational vehicle parks are not totally excluded. "A zoning ordinance or zoning decision shall not have the effect of totally prohibiting .. . a land use within a township in the presence of a demonstrated need for that land use . . . , unless there is no location within the township where the use may be appropriately located, or the use is unlawful." MCL 125.297a; MSA 5.2963(27a). Tolerating a nonconforming use, even if that use is undertaken by the City itself, does not cure defectively exclusionary zoning provisions. See *Eveline Twp v H & D Trucking Co*, 181 Mich App 25, 33-34; 448 NW2d 727 (1989).

We further hold that plaintiffs have not established that the trial court should have granted summary disposition in their favor on the merits of the facial due process count under MCR 2.116(I)(2). Plaintiffs' briefing of this issue on appeal includes no citations to authority in support of their position. This Court is thus relieved of having to entertain the argument. See *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984).

With regard to the procedural due process count, we agree with the City that the trial court erred in denying summary disposition on the merits. That the Zoning Board of Appeals could have been asked to exercise its interpretative power as part of a review of the city council's August 29, 1994, decision does not bring the matter outside of the statutory requirement that "[f]or special land use and planned unit development decisions, an appeal may be taken to the board of appeals only if provided for in the zoning ordinance." MCL 125.585(3); MSA 5.2935(3). Further, no possible interpretation of the ordinance by a Zoning Board of Appeals would necessarily afford plaintiffs relief, because that action would not by itself allow plaintiffs to develop their property as a recreational vehicle park. We conclude that plaintiffs did not establish a genuine issue of material fact concerning whether they were denied procedural due process. MCR 2.116(G)(4). Accordingly, we reverse the trial court's denial of summary disposition on the merits of the procedural due process count.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Joel P. Hoekstra
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell

[1] Although the City also asserted that plaintiffs could have sought an interpretation of the zoning ordinance from the Zoning Board of Appeals, this is not material to the issue of ripeness. The proper interpretation of a zoning ordinance is a question of law that a court is empowered to decide, *Jones v Wilcox*, 190 Mich App 564, 566; 476 NW2d 473 (1991), and no interpretation by the Board would

necessarily have afforded plaintiffs any relief in fact, see part IV. Seeking an interpretation from the Zoning Board of Appeals would, at best, be ancillary to any other options that may have been available to plaintiffs.

[2] At oral arguments, both parties essentially conceded that a recreational vehicle park is not a transient lodging facility.